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In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 649

LOCAL 174 and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GEORGE CAVANO and JIMMY MARTIN
Petitioners.

vs.

DELL L. SELLES, *Respondent*

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATEMENT OF THE CASE

Respondent had been a teamster since he started driving a horse and wagon in 1907 in Seattle and he continued in that occupation, working most of the time in Seattle until the events occurred which gave rise to this action (St. 132-135). He first became a member of petitioner Teamsters Local 174 in 1912 or 1913 and, except for a period when he was out of the city operating a transfer company of his own, he continued to be a member and a paid-up member in good standing even up to the time of the trial (St. 136-137).

The complaint alleged that in the beer and beverage industries, in which respondent had been employed during recent years, petitioners had such control over employment in Seattle that a teamster in any way ob-

jectionable to the petitioners could not obtain or continue in employment (T. 1-4).

For something over a year prior to April, 1952, respondent was not working steadily for any one employer but was doing extra work and was obtaining this work as an extra man out of the Teamsters Seattle hiring hall (St. 138). He and a few other members of Teamsters Local 174 had been trying for some time to obtain information for the members concerning the uses made of and the handling of the funds of the local and also to secure the right to ballot freely and secretly on election of officers and to obtain hiring hall practices which would eliminate personal favoritism (St. 10, 22, 144). Finally they arranged for a meeting to be held at a hall on Airport Way in Seattle on Thursday, April 3, 1952 (St. 10, 26-27). The respondent was one of those who hired the hall, but a sudden illness prevented his attending the meeting (St. 142-144). The petitioners knew that the meeting was being planned (St. 43-44, 98, 145-147). Some of those associated with the respondent arranged for police protection (St. 48).

The meeting was open only to members of Teamsters Local 174. Invitation was by word of mouth. The number of invited persons in attendance was estimated by one witness at 150 (St. 12) and by another at 350 members (St. 50). At about the time the meeting was to get under way, it was interrupted by the arrival of about 150 other members of Local 174, mostly beer truck drivers (St. 55), who came marching into the hall four or five abreast with petitioner George Cavano who was then acting as the appointed president of Local 174

(St. 80-81), in the lead (St. 12-13, 50-51). The new arrivals did some rather terrifying cursing (St. 13), did considerable shouting and generally carried on in a manner reminiscent of storm troopers (St. 13, 15-53). They succeeded in breaking up the meeting (St. 13, 16, 53).

When the respondent and the two others principally associated with him in this affair reported to the hiring hall on the following Monday, April 7, 1952, they were told by petitioner Jimmy Martin that there would be no further work for them out of the hall (St. 13-14, 49).

No employer ever actually discharged respondent at the request of Teamsters Local 174 or the other petitioners. The petitioners simply refused to dispatch him from the hiring hall, from which he was accustomed to be sent out to work, and the proof showed that without such dispatch he could not obtain an appreciable amount of work as a teamster. As a result respondent was thereafter unable to obtain employment at his usual occupation except for two short periods of work (St. 150-151, 153-156).

About June 1, 1953, respondent left the occupation and industry in which he had worked all his life and went to work at Boeing airplane factory, where he continued to be employed up to the time of the trial (St. 156) as a shipping and receiving clerk (St. 132).

Respondent brought a common-law action for tortious interference with employment. In his complaint he did not seek injunctive relief of any kind either by way of prohibition of acts being performed by petition-

ers or by way of a mandatory order for reinstatement in any employment. He asked only for damages (T. 1-4). The complaint alleged the controversy over free elections and the efforts to obtain information as to union funds, the meeting of April 3, 1952, the breaking up of the meeting by petitioners (T. 1-4).

The complaint alleged petitioners' control over jobs in the brewery industry in which respondent worked, the fact that respondent had for some time been working out of the hiring hall operated by the Joint Council. It alleged that in "wilful, deliberate and malicious retaliation against plaintiff Selles' participation in arranging the meeting . . . and his efforts in the intra-union controversy described," petitioners refused "to send him out on jobs and refused to allow him to work in his occupation as a teamster, and were successful in preventing him from working except in two instances for short periods of time" (T. 1-4). These are not, as petitioners describe them in their brief (p. 5), allegations that petitioners "had conspired to prevent him from getting employment."

The complaint asked damages, not "back pay." It alleged complete unemployment for a certain period. It went on to allege that on a certain date respondent obtained employment which has continued "but at rates of pay considerably less than he would have earned as a teamster." Seeking future damages (which the trial court refused to submit to the jury), respondent alleged: "Even after the trial of this action and during the remainder of his working life, the acts of defendants will continue to affect plaintiff Selles' earning power,

for he will never be able to earn in other employment as much as he would have earned as a teamster, and he will not be able to work for as many more years as he would have worked if he had been allowed to continue in his occupation as a teamster" (T. 1-4).

The petitioners' answer set up, among other things, an affirmative defense, labeled "Second Defense," in paragraphs III and IV of which the petitioners alleged that the acts complained of were unfair labor practices within the meaning of Sections 8(b)(1)(A) and (2) of the Labor Management Relations Act and that the subject matter was therefore within the exclusive jurisdiction of the National Labor Relations Board (T. 5-97). In his reply, respondent denied both allegations (T. 98-106).

Respondent took the position throughout the trial and in the Supreme Court of Washington that the acts relied upon by him as a common law tort did not constitute unfair labor practices under the Labor Management Relations Act. Petitioners presented evidence in the trial that they had not in any manner discriminated against respondent.

The original National Labor Board charge (Def. Exh. 12) and the amended charge (Def. Exh. 14) each include counts of closed shop and illegal hiring hall (which did not produce the tort for which respondent sued), interference with concerted activities in the physical breaking up of the April 3, 1952, meeting (which did not produce the tort for which respondent sued), and causing or attempting to cause employers to discriminate against respondent and two others by re-

fusing to dispatch them from the hall because of their activities in connection with the meeting (which is factually related to the facts upon which the tort is grounded).

The Labor Board complaint (Def. Exh. 15) alleged as independent violations of law (1) the closed shop and illegal hiring hall; (2) a maintenance of membership contract claimed to be illegal because made by a union not in compliance with section 9 (f) (g) and (h); (3) the restraint and coercion of workers by (a) breaking up the meeting, (b) physically threatening those attending the meeting and (c) refusing to dispatch because of participation in meeting; and (4) refusing to dispatch respondent because of his participation in the meeting.

The court below held that petitioners' acts were unfair labor practices within the meaning of the Labor Management Relations Act but that the Board's jurisdiction was not such as to exclude a common-law action for damages for the tort. It affirmed the trial court's judgment on the verdict for respondent, awarding him damages of $6,572.15.

QUESTIONS PRESENTED

Petitioners' statement of the question assumes the existence of unfair labor practices. We think that this court must first consider whether the case does involve unfair labor practices. This was an issue in the courts below and is an issue here; if disposed of adversely to the petitioners it would eliminate all Federal questions from the case.

Further, we think that petitioners' statement of the question is argumentative. The action was one to recover damages for a common law tort. For the period up to the trial, to which damages were confined by the court, the measure of damages alleged by the respondent was the difference between what he would have earned and what he did earn during the period for which damages were allowed. Since respondent was a casual worker, not regularly employed and not employed by any one employer, the jury's determination of what he would have earned as a teamster required consideration of elements other than mere passage of time and dollars per day. The evidence introduced did not change the nature of the legal rights asserted and convert the action into one for back pay.

We think that the following statement of the questions is more appropriate:

1. Do any of the acts of petitioners which furnished the factual basis for the common law tort of interference with employment for which respondent sued constitute unfair labor practices by petitioners under subsections 8 (b)(1)(A) and 8 (b)(2) of the Labor Management Relations Act?

2. If they do, are state courts prohibited from exercising common law tort jurisdiction in an action for damages for interference with employment?

REASONS FOR DENIAL OF THE WRIT

1. The Decision in This Case Is Not in Conflict with Other Lower Court Decisions

Petitioners say that this case involves the same questions now before the court in *International Association*

of Machinists, et al., v. Gonzales, 142 Cal. App.(2d) 207, 298 P.(2d) 92 (1956), cert. granted, 352 U.S. 966 (January 14, 1957) (Petition p. 8). By reference they assert all the reasons advanced for granting certiorari in that case (Petition, p. 10). The petitioners in the *Gonzales* case asserted that the state court's decision, which gave Gonzales the relief he had asked for, was squarely in conflict with the following decisions:

> *Born v. Laube,* 213 F.(2d) 407, 214 F.(2d) 349 (1954) cert. den., 348 U.S. 855 (October 18, 1954);
>
> *Sterling v. Local 438,* 207 Md. 132, 113 A.(2d) 389 (1955) cert. den., 350 U.S. 875 (October 24, 1955);
>
> *Mahoney v. Sailors Union of the Pacific,* 45 Wn.(2d) 453, 275 P.(2d) 440 (1954), cert. den., 349 U.S. 915 (April 25, 1955);
>
> *Real v. Curran,* 138 N.Y.S.(2d) 809 (1955).

In all of these cases except the *Sterling* case (in which the plaintiff was apparently still a member in good standing) the plaintiffs were suing for *reinstatement to membership* as well as damages.

In all of them, including *Sterling,* it appears that the plaintiff had not accepted his loss of employment opportunities as an accomplished fact and left his trade and the industry for employment elsewhere, as the pleadings and the evidence in the present case show respondent had done. To the contrary it appeared in each of those other cases, including the *Sterling* case, that the plaintiff was attempting by this means not only to recover his damages but also to regain or preserve his

status as a union member and to discourage the efforts to oust him from his trade and the industry. Technically, the plaintiffs were seeking to recover damages and, in all except *Sterling*, to obtain reinstatement. Realistically, this court might conclude that since the primary wrong for which relief was sought was denial of employment because of union action, and that since an important, if not the primary, purpose of the plaintiffs was to regain employment, the objectives of the lawsuits were so closely related to that of preserving employment opportunities by reinstatement which the National Labor Relations Board is empowered to accomplish that action by the courts would tend to interfere with the functions of the Board.

This court could so conclude without reaching the instant case, for in this case the respondent accepted the union-created lack of employment as an accomplished fact, left his trade and the industry, and sued only for the damages caused him by the union's tortious conduct. It was because of these differences that the court below distinguished its own *Mahoney* case and followed its recent decision in *Baun v. Lumber and Sawmill Workers Union*, 46 Wn.(2d) 645, 284 P.(2d) 275, in which the court placed particular emphasis on the fact that the case involved simply a common law action by the plaintiff for unlawful interference with his employment and that it did not involve "any question of present or future relations between the company and himself, or the company and its other employees" (T110-125).

2. Independently of the Question of Unfair Labor Practices, Which Was Ruled on Favorably to the Petitioners by the Court Below, the Decision in This Case Does Not Involve Any Federal Question of Substance Not Heretofore Determined by This Court, and Is in Accord with Applicable Decisions of This Court

Essentially the same problem as here presented has been considered in several cases under the Railway Labor Act. That Act is quite similar in some respects, setting up what could be called employer unfair labor practices. The courts interpret the Railway Labor Act to give the National Railway Adjustment Board the very same type of power that the National Labor Relations Board is given; *i.e.*, the power to reinstate employees wrongfully discharged, with back pay (CCH, Labor Law Reporter, Par. 4785, pp. 5035, *ff.*). Authority to so reinstate rests exclusively with the Railway Adjustment Board, but it is uniformly held that the courts may order payment of lost wages if the worker is content to take them alone and does not seek reinstatement. The principle invoked is that in the common law damage action in court, the worker is not seeking the relief which the Board is empowered primarily to provide.

> CCH Labor Law Reporter, Par. 6090, pp. 6391-2;
>
> *Moore v. Illinois Central Railroad Company*, 312 U.S. 630 (1941).

In the *Moore* case the plaintiff sued the railroad company for, and recovered, damages on account of a discharge wrongful because contrary to the terms of a

contract between the Brotherhood of Railroad Trainmen and the company.

The *Moore* case was followed in *Transcontinental & Western Air, Inc., v. Koppal*, 345 U.S. 653 (1953).

In *Slocum v. Delaware, Lackawanna & Western R. R. Co.*, 339 U.S. 239 (1950), it was held that so long as the National Railway Adjustment Board had not acted, neither a state nor a federal court had power to adjudicate a dispute between a railroad and a labor union involving the scope of collective bargaining agreements, since the Board's jurisdiction is exclusive. The Supreme Court, however, was careful to point out that the *Moore* case stood unimpaired:

> "Our holding here is not inconsistent with our holding in *Moore v. Illinois Cen. R. Co.*, 312 U.S. 630, 65 Led. 1089, 61 S.Ct. 754. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. *As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees.* * * * " (Emphasis supplied)

Neither does the Labor Management Relations Act bar the courts from adjudicating such cases even though unfair labor practices may be involved.

United Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656 (1954).

In the *Laburnum* case the court held that the Labor Management Relations Act has not

> "given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act."

In the course of its opinion the court said:

> "* * * The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.
>
> "The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay. * * *"

After taking note of petitioners' contention that the *Laburnum* case was distinguishable because there the complaining party was without remedy in damages under the Act, and the contention that the instant case was to be likened to the *Born* case, *supra*, the court below said:

> "We are * * * of the opinion that the instant case is distinguishable from the *Born* case. Here the complaining party is not seeking reinstatement in the union with back pay.
>
> "* * * Where the relief granted under state procedure is so similar to that granted under the Act

that a conflict ensues between the two, the conflicting state procedure is excluded. Where such relief is not similar to that afforded under the Act there is no conflict between the state and Federal remedies, and the state procedure survives. *United Construction Workers v. Laburnum Construction Co., supra.* Respondent's right to damages, in this case, for a common-law tort, differs from any remedy which the Board has power to provide. The state court, therefore, had jurisdiction to entertain the action." (T. 110-125).

3. This Case Is One of Isolated Significance; Its Review Is Not Important to Administration of the Labor Management Relations Act

In the *Gonzales* case, now under review by this court, the worker had been expelled from the union for a reason "other than his failure to tender the periodic dues and the initiation fees uniformly required," so that the case clearly fell within the language of the second subpart of subsection 8 (b)(2) of the Labor Management Relations Act. Because of that expulsion, the union dispatcher refused to send him out and he suffered loss of work. No claim has ever been made that respondent's case fell under the second subpart of 8 (b)(2). Respondent's union membership has never been "terminated."

Nor does the present case present facts clearly bringing it under some other subsection of 8 (b) of the Act. If it did, the question of state court jurisdiction would have more general import. There is grave doubt that 8 (b)(1)(A) is violated because the concerted activities claimed to be protected by the Act here relate to in-

ternal union affairs, not organizational rights. There is serious question as to the first subpart of 8 (b)(2) because (a) Selles being a member, any encouragement of union membership resulting from discrimination against him is difficult to claim, especially where the union's purpose was not to insist upon its control over hiring methods but to retaliate against and damage a rebel, and because (b) Seiles being a casual employee with no regular employment or regular employer, it is difficult to claim that there was any causing of an "employer" to discriminate against him, to "encourage or discourage" union membership. This point also suggests independently the isolated significance of a case concerned with such a casual employee.

The case indeed stands on the periphery of cases which should command the attention even of the National Labor Relations Board itself. Sections 8 (b)(1)(A) and 8 (b)(2) of the Act are aimed principally at the usual and more frequent case of union action combined with conscious employer discrimination caused or attempted to be caused by that union action.

For the foregoing reasons this case should be regarded as too isolated in significance and too unimportant in the administration of the Act to justify a review by this court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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